068

TRANSCRIPT

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

THIRD CIRCUIT.

SEPTEMBER TERM, 1899.

No.

PRESS COMPANY, LIMITED, A JOINT STOCK COMPANY
UNDER THE LAWS OF THE STATE OF [illegible]
WHOSE MEMBERS ARE RESIDENTS OF [illegible]

vs.

CITY BANK OF HARTFORD, A CORPORATION UNDER THE
STATE OF CONNECTICUT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JULY 15, 1899.

TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE

THIRD CIRCUIT.

SEPTEMBER TERM, 1893.

No. .

PRESS COMPANY, LIMITED, A JOINT STOCK ASSOCIATION UNDER THE LAWS OF THE STATE OF PENNSYLVANIA, WHOSE MEMBERS ARE RESIDENT THEREIN,

Plaintiff in Error,

vs.

CITY BANK OF HARTFORD, A CORPORATION OF THE STATE OF CONNECTICUT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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UNITED STATES OF AMERICA, *ss.* (1)

THE PRESIDENT OF THE UNITED STATES:

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, *Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the City Bank of Hartford, a Corporation of the State of Connecticut *vs.* The Press Company Limited, a joint stock association under the laws of the State of Pennsylvania, a manifest error hath happened, to the great damage of the said The Press Company, Limited, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the thirteenth day of June in the year of our Lord one thousand eight hundred and ninety-three.

SAMUEL BELL,
Clerk of the Circuit Court of the United States.
Eastern District of Pennsylvania.

Allowed by the Court.

CIRCUIT COURT OF THE UNITED STATES, (2)

EASTERN DISTRICT OF PENNSYLVANIA.

CITY BANK OF HARTFORD, a Corporation of the State of Connecticut, *Plaintiff*, *against* THE PRESS COMPANY, Limited, a Joint Stock Association under the laws of the State of Pennsylvania, whose members are resident therein.	October Sessions, 1892, No. 52.

UNITED STATES OF AMERICA, EASTERN DISTRICT OF PENNSYLVANIA } *ss.*

Pleas and proceedings before the Honorable the Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, of October Sessions, 1892, No. 52.

It is thus contained:

Be it remembered that on the tenth day of February, in the year of our Lord one thousand eight hundred and ninety-three, the City Bank of Hartford, a corporation of the State of Connecticut, by its attorneys, Paul Wilcox, Esquire, and George Tucker Bispham, Esquire, come into Court here and sues forth therefrom a writ of summons against the Press Company, Limited, which, with the indorsement and return thereto, is in the words and figures following, to wit:

(3) UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA, } *sct.*

The President of the United States, to the Marshal of the Eastern District of Pennsylvania, *Greeting:*

We command you, that you summon The Press Company, Limited, a joint stock association under the laws of the State of Pennsylvania, whose members are resident therein, late of your District, if it may be found therein, so that it be and appear before the Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, of the Third Circuit, at a session of the same court to be holden at Philadelphia, on the first Monday of March next, to answer to City Bank of Hartford, a corporation of the State of Connecticut, in a plea of assumpsit, and have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this tenth day of February, A. D. 1893, and in the 117th year of the Independence of the United States.

SAMUEL BELL,
Clerk.

(4) Endorsed: No. 52. Circuit Court, October Session, 1892. City Bank of Hartford *vs.* The Press Company, Limited. Summons, assumpsit. Filed March 2, 1893.

SAMUEL BELL,
Clerk.

Returnable on the first Monday of March next.

PAUL WILCOX,
GEO. TUCKER BISPHAM,
Attorneys for Plaintiff.

We hereby accept service of the within writ for the Press Company, Limited, and direct that our appearances be entered for the said Company, defendant.

J. H. SHAKESPEARE,
J. H. HEVERIN,
Attorneys for Defendant.

March 1, 1893.

J. V. R.

And afterwards, to wit: on the eighteenth day of March, A. D. 1893, (5) the plaintiff by leave of Court first had and obtained, comes into Court here and files its amended statement of claim, which being read, is in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES, (6)

EASTERN DISTRICT OF PENNSYLVANIA.

CITY BANK OF HARTFORD, a corporation of the State of Connecticut, *Plaintiff*,

against

THE PRESS COMPANY, Limited, a joint stock association under the laws of the State of Pennsylvania, whose members are resident therein, *Defendant*.

October Sessions of 1892. (7)

No. 52.

Plaintiff's Amended Statement of Claim.

The plaintiff brings this action to recover from the defendant the sum of $833.34 with interest thereon at 6 per cent. from the second day of November, 1892; the sum of $1,250 with interest thereon from the sixteenth day of February, 1892, and the sum of $1,250 with interest thereon from the sixteenth day of February, 1892, being the amounts of three promissory notes drawn by the defendant to the order of the Thorn Type Setting Machine Company, and purchased before maturity for value by the said City Bank of Hartford, the plaintiff herein.

The said note of $833.34 having been purchased by the plaintiff upon the fifteenth day of February, 1892, and the said note for $1,250, dated the sixteenth day of February, 1892, having been purchased upon the fourteenth day of September, 1892, and the said note of $1,250, dated February 16, 1892, having been purchased upon the fourteenth day of September, 1892. The | following are copies of the said notes: (7)

$833.34 Philadelphia, Pa., Nov. 2, 1891.

Fifteen months after date we promise to pay to Thorne Type Setting Machine Co., or order, Eight hundred and thirty-three & 34-100 dollars, at our office, without defalcation for value received, with interest at six per cent.

THE PRESS COMPANY LIMITED.

No. Due Feby. 5, '93

(Signed) CALVIN WELLS, *Chairman*.
(Signed) R. J. COOK, *Treasurer*.

(Endorsement)

Thorne Typesetting M. Co.
E. F. LINKE, *Mgr*.
C. T. WELLES, *Cashier*.
CHAS. H. PATTERSON, *Cashier*.

$1,250.00. Philadelphia, Pa., Feby. 16, 1892.

On January 9, 1893, after date we promise to pay to Thorne Typesetting Machine Co., or order, Twelve hundred and fifty dollars, at Western Natl. Bank, without defalcation for value received, with interest at 6% per annum.

PRESS COMPANY, LIMITED.

No. Due

(Signed) CALVIN WELLS, *Chairman.*
(Signed) R. J. COOK, *Treasurer.*

(Endorsement)

Thorne Typesetting M. Co.
E. F. LINKE, *Mgr.*
C. T. WELLES, *Cashier.*
CHAS. H. PATTERSON, *Cashier.*

(8) $1,250.00. Philadelphia, Pa., Feby. 16, 1892.

On January 23rd, 1893, after date we promise to pay to Thorne Typesetting Machine Co., or order, Twelve hundred and fifty dollars at Western Natl. Bank without defalcation for value received, with interest at 6% per annum.

PRESS COMPANY, LIMITED.

No. Due

(Signed) CALVIN WELLS, *Chairman.*
(Signed) R. J. COOK, *Treasurer.*

(Endorsement)

Thorne Typesetting M. Co.
E. F. LINKE, *Mgr.*
C. T. WELLES, *Cashier.*
CHAS. H. PATTERSON, *Cashier.*

Each of the said notes were presented to the defendant at its office, in the City of Philadelphia, on the dates when they respectively fell due, and payment thereof was refused, and due protest of said refusal of payment thereupon made by a notary public in and for the County of Philadelphia.

The defendant has refused and still continues to refuse to pay the said notes, and is still indebted to the plaintiff in the sums thereof, to wit, the sum of $3,333.34, with interest on $833.34 thereof from the second day of November, 1892, and upon $2,500 thereof from the sixteenth day of February, 1893, which said sum with interest thereon is justly due and owing the plaintiff, wherefore it brings this suit.

THE CITY BANK OF HARTFORD,
By CHARLES T. WELLES,
Cashier.

STATE OF CONNECTICUT, } ss. (9)
COUNTY OF HARTFORD. }

Charles T. Welles, being duly sworn according to law, deposes and says that he is the cashier of the said plaintiff, and that the facts set forth in the foregoing Statement of Claim are true.

Sworn and subscribed before me this fourteenth day of March, 1893.

(Signed) FRANK B. SMITH,
Notary Public.

[SEAL]

Endorsed: No. 52. October Sessions, 1892, C. C. U. S. City Bank of Hartford *vs.* Press Company, Limited, Plaintiff's Amended Statement of Claim, filed March 18, 1893. Samuel Bell, Clerk. Bispham.

And afterwards, to wit, on the eighth day of April, A. D. 1893, the defendant, by its attorneys, come into Court here and files its affidavit of defence which, being read, is in the words and figures following, to wit:

		(10)
BANK OF HARTFORD,	C. C. U. S.	
vs.	E. D. of Pa., Oct. Sess., 1892.	
THE PRESS COMPANY, LIMITED.	No. 52.	

COUNTY OF PHILADELPHIA, *ss.*

John B. Townsend being duly sworn, says, I am employed by the defendant in the capacity of assistant to R. J. Cook, the treasurer of the defendant.

I am informed and suggest to the Court that the plaintiff is not entitled to judgment in this case upon statement filed, for the reason that the notes sued upon do not purport on their face to have been signed by two managers of the defendant co., nor is there any averment therein that the persons who signed the same are or were managers of the deft. company.

(Signed) JOHN B. TOWNSEND.

Sworn and subscribed to before me this eighth day of April, 1893.

(Signed) H. J. HAUCK,
Notary Public.

Endorsed: No. 52, Oct. Sess., 1892, C. C. of U. S. E. D. of Pa., Bank of Hartford *vs.* The Press Co. Limited. Affidavit of Defence. Filed Apr. 8, 1892, Samuel Bell, Clerk. Shakespeare.

And afterwards, to wit, on the 14th day of April, A. D. 1893, the defendant, by its attorney, comes into Court here and files its supple-

mental affidavit of defence, which being read is in the words and figures following, to wit:

(11)	BANK OF HARTFORD,	C. C. of U. S.
	vs.	E. D. of Pa.
	THE PRESS COMPANY, LIMITED.	October Session. No. 52.

COUNTY OF PHILADELPHIA, } *ss.*
STATE OF PENNSYLVANIA, }

John B. Townsend, being duly sworn, says that he is the assistant to the Treasurer of the defendant, and as such has a knowledge of the facts touching this suit.

The Thorne Type Setting Machine Company, the payee of the three notes upon which this suit is brought, is a foreign corporation, having been chartered under the laws of the State of New Jersey, and has never complied with the provisions of the Act of Assembly of this Commonwealth passed in 1874, in which it is provided that it shall not be lawful for any foreign corporation to do business in this Commonwealth, until it shall have filed in the office of the Secretary of the Commonwealth, a statement under the seal of the corporation and signed by the President and Secretary thereof, showing the title and object of said corporation, the location of its office or offices and the name and names of its authorized agent or agents therein; and the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents in each and every of said offices, and any person or persons, agents, officer or employee of any such foreign corporation who
(12) shall transact any business within this Commonwealth for | any such foreign corporation without the provisions of this Act being complied with, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding one thousand dollars, or either, at the discretion of the Court, in this that the said The Thorne Type Setting Machine Company have never filed with the Secretary of the Commonwealth, the certificate required to be filed by the mandate of the foregoing Act.

Deponent further avers, that The Thorne Type Setting Machine Company was doing business in this State, in violation of the provisions of the aforesaid Act of 1874, and did in the City of Philadelphia by and through R. W. Wilson, President, and John Woodfin, Treasurer thereof, bargain and sell to the defendant herein certain type-setting machines, and did in the said City of Philadelphia, by means of and through false and fraudulent representations as to the capacities of said machines, obtain from the defendant the three promissory notes, upon which this suit is brought, in part payment for said machines, which notes were made, executed and delivered to the Thorne Type Setting Machine Company in the City of Philadelphia.

Deponent further avers, that before the said three notes were given, the said The Thorne Type Setting Machine Company, by and through its authorized agents and employees and under the direction and control of R. W. Wilson, the President thereof, was doing business in this City, and was engaged therein, in operating and running the said type-setting machines, and has so continued to run | and operate the same from that (13)
time until within a few weeks ago, during all of which time the said Thorne Type Setting Machine Company maintained an office in this City, to which it invited people to purchase the said type-setting machines.

Deponent therefore avers, and so suggests to the court, that the contract upon which this suit is brought was made in the State of Pennsylvania by a foreign corporation, while it was carrying on and doing business in this State, and in pursuit of a business which it was then engaged in conducting and carrying on in this State in violation of the mandates and provisions of the aforesaid Act of the General Assembly of this Commonwealth, and therefore no action can be maintained to enforce that contract or the price of the contract.

Sworn and subscribed to before me this fourteenth day of April, 1893.
(Signed) SAMUEL BELL,
U. S. Commissioner.

JOHN B. TOWNSEND.

Endorsed.

No. 52. Oct. Sess. 1892. C. C. of U. S. E. D. of Pa. Bank of Hartford *vs.* The Press Co., Limited. Supplemental affidavit of defence. Filed Apr. 14, 1893, Samuel Bell, Clerk. Shakespeare.

And afterwards, to wit, on the ninth day of May, A. D. 1893, this (14)
cause being called for argument on motion for judgment for want of a sufficient affidavit of defence, and having been argued by counsel for the respective parties, and the Court not being fully advised in the premises takes further time to consider thereof.

And afterwards, to wit, on the sixth day of June, A. D. 1893, come the parties aforesaid by their attorneys aforesaid, and the Court being now fully advised in the premises render the following opinion.

CIRCUIT COURT OF THE UNITED STATES, (15)

EASTERN DISTRICT OF PENNSYLVANIA.

CITY BANK OF HARTFORD
vs.
PRESS COMPANY, Limited.

Oct. Sess. 1892.
No. 52.

This action is brought on three promissory notes made by the defendants to the order of the Thorne Type-Setting Machine Company, and by it endorsed. Two affidavits of defence have been filed, which set up:

1st. That "the notes sued upon do not purport on their face to have been signed by two managers of the defendant company; nor is there any averment that the persons who signed the same are, or were, managers of the defendant company."

2d. That the payee, being a corporation not of the State of Pennsylvania, had not complied with certain requirements of a statute of that State which it was necessary that it should comply with in order that it might lawfully do business therein; and that these notes were given under a contract which was violative of that statute.

The first of these defences is ineffectual because each of the notes appears on its face to have been signed by the "Chairman" and by the "Treasurer" of the defendant association; and the Act of the General
(16) Assembly of Penn | sylvania, of May 10, 1889, (P. L., p. 183) expressly provides that these officers shall be managers.

In the case of Thorne Type Setting Company *vs.* The Record Publishing Company (not reported) Judge Thayer, President of the Court of Common Pleas No. 4 of Philadelphia county, recently sustained the defence last mentioned, as between the original parties to notes like those which are the subject of the present action. I am not disposed to question the soundness of that decision; but it cannot avail the defendant in this case. The plaintiff here is a holder who "purchased before maturity for value." This is alleged in the plaintiff's statement of claim, and is not denied in the affidavits of defence. It must, therefore, upon this rule be assumed to be the fact. Moreover, the affidavits do not assert that the plaintiff had notice of the payee's not having complied with the Pennsylvania law; and, having bought the notes before maturity, the presumption is that it did not have such notice. Hence it appears, upon the case as presented, that the plaintiff is a purchaser of negotiable notes, for value, before maturity, and without notice; and that, as against such a plaintiff, the statutory illegality alleged is not a valid defence is hardly open to question. "The *bona fide* holder for value
(17) who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal | consideration" of the character relied upon as a defence to this suit. If the law were otherwise the business of discounting commercial paper would involve a hazard against which it would be impracticable for banks, or others who engage in it, to guard themselves. Daniels on Negotiable Instruments, Sec. 197 (2); Byles on Bills (Sharswood Ed'n of 1853) p. 110; Wyatt *vs.* Bulmer, 2 Esp. 538, and notes; Williams *vs.* Cheney, 3 Grey, 220; Carpenter *vs.* Longan, 16 Wall., 271.

The Rule for Judgment for want of a sufficient affidavit of defence is made absolute.

GEO. M. DALLAS,
C. J.

June 6, 1893.

Endorsed.

No. 52, Oct. Sess., 1892. C. C. U. S. E. D. of Pa. City Bank of Hartford *vs.* Press Company, limited. Opinion by Dallas, Cir. J., ordering rule for judgment for want of a sufficient affidavit of defence be made absolute. Filed June 6, 1893, Samuel Bell, Clerk. M.

And afterwards, to wit, on the 6th day of June, A. D. 1893, judg- (18)
ment is entered in favor of plaintiff and against the defendant for want of a sufficient affidavit of defence.

CIRCUIT COURT OF THE UNITED STATES, (19)

EASTERN DISTRICT OF PENNSYLVANIA.

THE CITY BANK OF HARTFORD	October Sessions, 1892.
vs.	No. 25.
THE PRESS COMPANY, Limited.	

The above defendant believing itself to be aggrieved by the final judgment entered against it on the 6th day of June, 1893, in the above entitled proceedings, hereby prays for a writ of error to the United States Circuit Court of Appeals, Third Circuit, and that a transcript of the record and proceedings and papers upon which such final judgment was entered, duly authenticated, may be sent to the United States Court of Appeals, Third Circuit.

JAMES H. SHAKESPEARE,
Attorney for Defendant.

Allowed. Security in $8,000.

GEO. M. DALLAS,
C. J.

Assignment of Error. (20)

1. Because the learned Court erred in entering judgment against the defendant for want of a sufficient affidavit of defence.

2. Because the learned Court erred in making absolute the rule upon defendant to show cause why judgment should not be entered against, for want of a sufficient affidavit of defence.

3. Because the facts set forth in the affidavit of defence constituted a good and sufficient defence to the plaintiff's claim as set forth in its statement filed.

Know all men by these presents, that we, The Press Company, (21)
Limited, as principal, and William M. Singerly and Robert J. Cook, as

sureties, are held and firmly bound unto the City Bank of Hartford, in the full and just sum of eight thousand dollars to be paid to the said the City Bank of Hartford, their or its certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals and dated this ninth day of June, in the year of our Lord one thousand eight hundred and ninety-three. A. D., 1893.

WHEREAS, lately at a Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in a suit depending in said Court between the City Bank of Hartford and the Press Company, Limited, of October Sessions, 1892, No. 52, a judgment was rendered against the said The Press Company, Limited, and the said The Press Company, Limited, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The City Bank of Hartford, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia, within thirty days.

Now, the condition of the obligation is such, That if the said The Press Company, Limited, shall prosecute to effect, and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

SAMUEL BELL,
JOHN A. MERRICK.

THE PRESS COMPANY, Limited.

[SEAL] R. J. COOK
CHAS. EMORY SMITH } Managers.
[SEAL] WILLIAM M. SINGERLY.
[SEAL] R. J. COOK.

Approved by
GEO. M. DALLAS,
C. J.

These sureties are satisfactory.
GEO. TUCKER BISPHAM,
For Plaintiff.

(22) No. 52, October Sessions, 1892, C. C. U. S. E. D. of Pa. The City Bank of Hartford *vs.* the Press Company, Limited, Bond sur Writ of Error.
Filed Jan. 13, 1893.

SAMUEL BELL,
Clerk.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } ss.

(23)

I, Samuel Bell, Clerk of the Circuit Court of the United States of America, for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the City Bank of Hartford *vs.* the Press Company, Limited, No. 52, October Sessions, 1892, on file and now remaining among the Records of the said Court in my office.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of the said Court, at Philadelphia, this twelfth day of July, in the year of our Lord, one thousand eight hundred and ninety-three, and of the Independence of the United States, the one hundred and eighteenth.

SAMUEL BELL,
[SEAL] *Clerk Circuit Court, U. S. East. Dist. of Penna.*

(24)

UNITED STATES CIRCUIT COURT OF APPEALS,

THIRD DISTRICT.

PRESS COMPANY, LIMITED, a joint stock association under the laws of the State of Pennsylvania whose members are resident therein, *Plaintiff in Error,*	September Term, 1893.
vs.	No. 17.
CITY BANK OF HARTFORD, a corporation of the State of Connecticut.	

In error to Circuit Court of the United States for the Eastern District of Pennsylvania.

Before ACHESON, Circuit Judge, and BUTLER, District Judge.

BUTLER, J.:—

The action is on promissory notes drawn by the plaintiff to the Thorne Type-Setting Company, or order, and indorsed to the defendant. The claim filed avers that the indorsements were before maturity and for value.

The affidavit of defence denies proper execution of the notes, and says the payee is a foreign corporation, without authority to transact business in this State, because of failure to comply with the statute of 1874; that the notes grew out of business transacted here, and are therefore invalid.

The affidavit was held to be insufficient, and judgment was entered accordingly.

The defendant (below) appealed, and assigns the entry of judgment as error.

The objection to the execution of the notes is abandoned. The points urged are, first, that the notes are invalid, and, second, that the pleadings do not warrant the judgment.

Neither objection can be entertained. Granting that the notes could not be enforced by the payee, they can be by an innocent indorsee. This seems to be settled. Daniel on Negotiable Instruments, section 197; Sharswood's Ed. of Byles on Bills, 110; Wyatt *vs.* Bulmer, 2 Esp., 538; Williams *vs.* Cheyney, 3 Grey, 220; Carpenter *vs.* Longan, 16 Wall., 271. Why should not the ordinary rules which govern the transfer of negotiable paper apply? Why should the plaintiff, who has expressly promised to pay the indorsee, escape on the defense set up? If the notes were wrongfully given, in violation of the statute, the wrong was his. Why, therefore, should he be allowed to cast the consequences upon another? If the payee's right to transact business in this State was questionable *he* should have investigated it. He could as readily have discovered the lack of authority before drawing the notes as after. The indorsee knew nothing of such question. He did not know even that the notes grew out of a transaction here. It is urged that public policy forbids a recovery; that to hold otherwise will nullify the statute. We do not think so. If the legislature intended the consequences claimed we would expect it to say so. It has not, and, we think, justly, for otherwise the drawer of such paper might cast the consequences of his misconduct or carelessness on others, who rely on his promises without means of protecting themselves. The public interests require that persons dealing with foreign corporations shall inform themselves of the authority to transact business here in advance, instead of aiding violations of the statute, and then repudiating their promises to the injury of innocent persons. Public policy requires that the circulation of negotiable paper shall be free from unnecessary trammels.

We think the objection based on the pleadings is equally untenable. The holder of negotiable paper is presumed to have received it for value before maturity. Where the common-law method of pleading prevails this presumption stands until it is assailed by plea or notice, followed by proof. Under what was known in this State, prior to 1887, as the "affidavit of defense law," it was held that the defendant's averment of fraud in obtaining the note, or other similar defense, was of itself a sufficient attack upon the holder's *bona fide* to deprive him of a right to judgment before trial. (Hutchinson *vs.* Boggs & Kirk, 28 Penna., 296; Hoffman *vs.* Foster, 7 Wright, 137.) Under the new system, introduced in 1887, whereby the plaintiff is required to file a statement of claim, specifying the facts on which he relies to recover, and the defendant required to answer, it is held that all facts so specified, and not denied in the answer, are to be treated as admitted. (Ashman *vs.* Weighley, 148 Penna., 61.) In Erie Boot and Shoe Co. *vs.* Eichenbaub, 127 Penna., 164, this conclusion was foreshadowed, though the case did not call for its announcement. The latter case is especially interesting, as the suit was on negotiable paper, and the question was similar to ours. Here the plaintiff avers that he obtained the note before maturity, for value; and the defendant does not deny

it. This is therefore a conceded fact. It is urged, however, that more is necessary to establish the plaintiff's *bona fides*—that he should further show that he was unaware of the defense now set up. There are two answers to this: First, that it would be unreasonable to hold the plaintiff to proof of such a fact—it is always difficult to prove a negative, and parties are not generally required to do it; and, second, that the fact of obtaining the note in due course, as by paying value before maturity, raises a presumption that he was unaware of the defense. (Carpenter *vs.* Longan, 16 Wall., 273.) Especially strong is this presumption where the defendant, as here, concedes the indorsement in due course, and makes no suggestion of bad faith.

The judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, (25)

THIRD CIRCUIT.

PRESS COMPANY, LIMITED, *Plaintiff in Error,*	September Term, 1893.
vs.	No. 17.
CITY BANK OF HARTFORD.	

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed with costs.

GEO. M. DALLAS.

PHILADELPHIA, November 10th, 1893.

UNITED STATES OF AMERICA, } *ss.*

I, William V. Williamson, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in the case of the Press Company, Limited, plaintiff in error, *vs.* City Bank of Hartford, a corporation of the State of Connecticut, No. 17, September Term, 1893, on file and now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-third day of November, A. D. 1893, and of the Independence of the United States the one hundred and eighteenth.

[SEAL]

WM. V. WILLIAMSON,
Clerk of the United States Circuit Court of Appeals, Third Circuit.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1893. No. .

Ex parte PRESS COMPANY LIMITED, *a joint-stock association under the laws of the State of Pennsylvania, whose members are resident therein.*

Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court of the United States for its revision and determination the writ of error taken by Press Company Limited, a joint-stock association under the laws of the State of Pennsylvania, whose members are resident therein, plaintiff in error, *vs.* City Bank of Hartford, a corporation of the State of Connecticut.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Press Company Limited would respectfully represent to the court that it is a joint-stock association formed under the laws of the State of Pennsylvania, and is engaged in the publication of a daily newspaper in the city of Philadelphia known as *The Press*, and has its place of business at Seventh and Chestnut Streets in the city of Philadelphia.

The defendant in error is the City Bank of Hartford, Conn. Suit was brought by the latter in the Circuit Court of the United States for the Eastern District of Pennsylvania

against your petitioner upon three promissory notes drawn by your petitioner to the order of the Thorne Type-Setting Machine Company, and indorsed by the payee. (Copies of the notes appear in Transcript of Record, pages 6, 7, 8.)

The statement of claim set forth that the notes had been "purchased before maturity for value" by the plaintiff. (Transcript of Record, page 6.)

The defense set up that the notes were given for an unlawful consideration, involving a violation of a statute of Pennsylvania, and for that reason were illegal, and could not be recovered upon in the hands of a transferee.

The affidavit of defense filed by your petitioner set forth that the Thorne Type-Setting Machine Company, the payee of the notes upon which suit was brought, was a foreign corporation, chartered under the laws of the State of New Jersey, and doing business in the State of Pennsylvania in violation of an Act of Assembly of that Commonwealth, declaring that it shall not be lawful for foreign corporations to do business in the State of Pennsylvania until they had complied with the provisions of the Act; that the company, without complying with this Act, did business in Pennsylvania, and by false and fraudulent representations made to your petitioner sold to it machines for which said notes were given. (Affidavit of Defense, Transcript of Record, pages 11, 12, 13.)

A rule was entered by the plaintiff bank for judgment for want of a sufficient affidavit of defense. The rule was made absolute, and an opinion filed by Dallas, C. J. (Transcript of Record, pages 15, 16, 17.)

From the judgment thus entered a writ of error was sued out to the Circuit Court of Appeals for the Third Circuit, but the Circuit Court of Appeals, in an opinion appearing in Transcript of Record, sustained the judgment.

Your petitioner files herewith, as required by rule 37, a certified copy of the entire record of the case in the Circuit Court of Appeals, and respectfully shows to your Honorable Court that the question involved is one of such gravity and importance as to justify to your Honorable Court an applica-

tion to require the record of said proceedings to be certified to the Supreme Court for its review and determination.

PRESS COMPANY LIMITED,
By HAMPTON L. CARSON,
JAMES H. SHAKESPEARE,
Solicitors for Petitioner.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.*

This day personally appeared before me, a United States Commissioner for the Eastern District of Pennsylvania, , one of the managers of the defendant below and plaintiff in error in the Circuit Court of Appeals for the Third Circuit in the hereinbefore entitled cause, and, having been duly , did depose and say that he has read the foregoing petition, and that the facts therein stated are true to the best of his knowledge, information, and belief.

and subscribed to before me, this day of November, Anno Domini 1893.

BRIEF OF ARGUMENT IN SUPPORT OF APPLICATION FOR *CERTIORARI.*

I. It is submitted most respectfully that the question raised upon this record is of sufficient gravity in its bearing upon the law of negotiable instruments to justify its careful consideration. It involves a grave question of public policy—of upholding the law and discouraging its violation or evasion. Can a note be recovered upon in the hands of an indorsee, when the defense set up is that of an illegal origin, without *proof* of title to the paper that it was taken in due course of business for value, without notice of the unlawful consideration?

The question is not primarily whether the transferee has a

good title, but whether, in view of the defense, he ought not to be compelled to submit himself to cross-examination before recovery. In other words, whether the burden is not thrown upon him of proving his case before he can recover.

Attention should be paid to the record and the manner in which the question is raised by the pleadings. It will be observed that there was no trial, but the entry of a final judgment against the defendant without the opportunity of a jury trial, without an opportunity to cross-examine the plaintiff, or confront him with the defendant's witnesses. The judgment rests entirely upon the averments made in the statement of claim. That statement contains no averments of how much was paid for the notes, nor does it detail the circumstances under which the notes came into the possession of the plaintiff, nor does it aver that the plaintiff is the present owner of the notes, nor does it aver that the plaintiff had no notice of the illegal consideration. It contains merely a bald assertion that the bank purchased the notes before maturity. Only this, and nothing more.

The affidavit of defense discloses a case of illegal consideration, so constituted as to render the paper sued upon not merely without consideration, but absolutely illegal and void between the immediate parties and all others who did not obtain it for value and without notice; not only void in the negative sense, but affirmatively illegal as violating the positive provisions of a statute.

Why should the plaintiff, under these circumstances, be entitled to judgment without being required to prove that he had no notice or knowledge of the illegal consideration; without being compelled to prove what he gave for the paper; without being compelled to show that he is the present owner of the notes, and that he has not been paid by the Thorne Type-Setting Machine Company, or been fully indemnified by that company for the payment of the notes?

Do not the facts established shift the burden of proof, and require the holder of the notes to prove that it is the holder for value, and received the notes in the usual course of business while current, and under circumstances which would

create no presumption or permit a jury to draw the inference, fairly or reasonably, that he had notice of the facts which made the consideration illegal ?

The case really is one as to the burden of proof. In cases of duress and fraud, as well as where the paper has been stolen, the equities of the defendant constitute the basis of the rule that the holder should be put to proof of title, but in the case of illegality of consideration, both parties are generally equally in fault, and it is not to protect the equities of defendants, but on broad grounds of public policy, to uphold the law and to discourage its violation or evasion, that the burden of proof is cast upon the plaintiff. It is as much the duty of courts to discourage the violation or evasion of law as to protect the equities of the parties, and it is on this principle that the naked defense of illegality is laid.

See Lord Mansfield's opinion in Holman *vs.* Johnson, Cowper's Reports, 343.

It should appear affirmatively that the plaintiff is not in fault and that he has real equities to be protected. It may very well be that in a certain sense it is requiring of a plaintiff proof of a negative to show an actual want of notice, but he should at least be compelled to show the nature of the transaction accompanying the transfer, and if that disclosed no suspicious circumstances resulting in a suggestion of such notice it might make a *prima facie* case of want of notice, and thus throw the burden on the defendant of proving notice. But, on the contrary, there are certain facts entirely within the knowledge of the plaintiff which he ought to prove affirmatively. The *amount* of consideration given by him in exchange for the paper is entirely distinct from the question of notice, and this is a fact peculiarly within the knowledge of the plaintiff and not within that of the defendant.

These features, arising in cases of this character, are dwelt upon by capable jurists in the text-books as well as in the reports. The cases of Patton *vs.* Coat, 5 Mich., 510; Niles *vs.* Rhoads, 7 Mich., 374; Carrier *vs.* Carew, 31 Mich., 373,

all lay down the rule that the presumption that the holder had no notice of the illegal consideration can never be allowed without proof of that fact when the paper is absolutely void between the original parties on the ground of illegality.

In the first volume of Daniel on Negotiable Instruments, fourth edition, page 16, section 815, the rule is stated as follows:—

PROOF OF FRAUD OR ILLEGALITY SHIFTS BURDEN OF PROOF.

"There may be at this juncture a shifting of the burden of proof from the defendant to the plaintiff, for the principle is well established that if the maker or acceptor, who is primarily liable for the payment of the instrument, or any party who is bound by the original consideration proves that there was fraud or illegality in the inception of the instrument, or if the circumstances raise a strong suspicion of fraud or illegality, the owner must then respond by showing that he acquired it *bona fide* for value in the usual course of business while current, and under circumstances which create no presumption that he knew the facts which impeach its validity. This principle is obviously salutary, for the presumption is natural that the instrument so issued would be quickly transferred to another, and unless he gave value, which could be easily proven if given, it would perpetrate great injustice and reward fraud to permit him to recover."

Mr. Daniel relies upon fifty-eight different authorities, arising in almost every State in the Union, as well as in the Supreme Court of the United States.

In the case of Smith *vs.* Sac County, 11 Wallace, page 139, it was held in a suit on a negotiable security that when the defendant has shown strong circumstances of fraud in the origin of the instrument, this casts upon the holder the necessity of showing that he gave value for it before maturity.

This case was submitted to the court without a jury, which found the facts constituting such fraud, and did not find that the plaintiff gave value for the paper; the judgment was held to be rightfully given for the defendant.

Mr. Justice Miller delivered the opinion, and employed this language:—

"Treating the bonds and coupons sued on in this case, which are payable to bearer, as negotiable paper, and conceding to its fullest extent the protection which commercial usage throws around such paper in the hands of a *bona fide* purchaser for value before maturity, it is nevertheless undoubtedly true that circumstances may be shown in connection with the origin of such paper, which will devolve upon the holder the burden of showing that he *did* give value for it before maturity. This principle is asserted in the text-books of Chitty, Story, Parsons, and others, and is so laid down and sustained by numerous citations of authorities by the learned American annotator of Smith's Leading Cases, page 752. In one of the latest of the English cases, Hall *vs.* Featherstone, Pollock, C. B., says: 'If there are any circumstances in the nature of fraud or illegality which can be left to the jury, proof of these circumstances will cast on the plaintiff the *onus* of showing that he gave value for the bill.' To which Martin, Baron, added: 'I think there was, at the close of the defendant's case, evidence for the jury in support of the plea. The authorities have established a principle which is contrary to the general rule, by which the defendant is bound to prove all the facts necessary to constitute a defense.' And Bramwell said: 'The cases have established that if there be fraud or illegality in the inception of a bill or in the circumstances under which it was taken by the person who indorsed it to plaintiff, he must prove consideration. That is established beyond controversy.'"

The authoritative effect of Hall *vs.* Featherstone, which is so freely quoted by Mr. Justice Miller, is dwelt upon by Mr. Justice Clifford in the case of Commissioners, &c., *vs.* Clark, 94 U. S., 278, and also in the case of Collins *vs.* Gilbert, *Ibid.*, 753, where the same learned judge says, after discussing all the presumptions arising from the actual possession of negotiable instruments: "Proof of gross negligence is not sufficient to overcome the *prima facie* presumption of title arising from possession; but if it be alleged and proved that

the instrument had its inception in illegality or fraud, a presumption arises from that proof that the plaintiff took it without value, or, in other words, it so far shifts the burden of proof that unless the plaintiff gives satisfactory evidence that he gave value for the same the defense will prevail. Fitch *vs.* Jones, 5 Ellis & Blackburn, 246; Harvey *vs.* Pierce, 6 Hurlstone & Gordon, 660. Where there are circumstances, the nature in of fraud or illegality, which can properly be left to the jury, proof of those circumstances will cast on the plaintiff the *onus* of showing that he gave value for the bill or note. Hall *vs.* Featherstone, 3 Hurlstone & Gordon, 287; Miles *vs.* Barber, 1 Meson & W., 432."

A similar result was reached by the Supreme Court of Pennsylvania in the case of Lerch Hardware Co. *vs.* First Nat. Bank of Columbia, 109 Pa. St., page 240, where Mr. Justice Trunkey speaks as follows:—

"To support an action by the indorsee of negotiable paper, against the maker, in the first instance it is only necessary for the plaintiff to put the paper in evidence. Then, if the defendant proves that the paper was put in circulation by fraud or undue means, his defense will prevail, unless the plaintiff establishes that he acted fairly and paid value. This was decided more than seventy years ago in Holme *vs.* Karsper, 5 Binney, 469, and has continued an accepted rule. * * * The latest decisions have set strongly in favor of the principle that nothing but clear evidence of knowledge or notice, fraud or *mala fides*, can impeach the *prima facie* title of a holder of negotiable paper taken before maturity: Moorehead *vs.* Gilmore, 77 Pa. St., 118. But, either with respect to this principle, or to the earlier principle 'that if an indorsee takes a note heedlessly, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or indorser may be let into his defense,' the rule remains unshaken that if the defendant proves that the note was obtained or put into circulation by fraud or undue means, the plaintiff will be put to proof that he obtained it before maturity, in good faith, and for value."

This is simply a reaffirmation of the rule in Snyder *vs.* Riley, 6 Penna., 164, and Knight *vs.* Pugh, 4 W. & S., 445, where it was held, in a suit upon a note by the indorsee against the drawer, that if there is evidence to raise a suspicion to the extent of a *prima facie* case, the defendant may compel the plaintiff to show *when* and *how* he became the holder.

Without discussing the minor differences of judgment prevailing in other tribunals, it seems sufficiently well established in the Supreme Court of the United States, as well as in the State of Pennsylvania, that upon the disclosure of an illegal consideration, or, what is the same thing, an unlawful origin, the holder should be put to proof of the circumstances under which he acquired title to the paper, and should further prove the value which he gave for it.

In Pennsylvania, where the question now under discussion arose, a statute required an affidavit of defense to be filed. Had this not been so, and the case had gone to trial before a jury, it would have been incumbent upon the plaintiff to have proved, after the facts set up in the affidavit had been proven by the defendant, that he was the holder for value before maturity; that he had taken the note in the usual current of business, and was not cognizant of any fact which would make him chargeable with notice of the illegal consideration. In the case before the court judgment was entered for want of a sufficient affidavit of defense, and the case was thus arrested in its progress towards a jury trial. Surely, if such would have been the requirements of proof upon the trial, how can it be asserted that there is no necessity of averring in the statement such facts as are essential to entitle the plaintiff to recover?

The case of Patton *vs.* Coat, 5 Michigan, page 510, is practically decisive of the rule we have been contending for, namely, that in a suit by an indorsee of a note against the maker, where the defendant has made out a *prima facie* case by showing that the consideration of the note was a transaction prohibited by statute, the holder of the note must show the nature of the transaction accompanying the transfer.

The suit was upon a draft. The defendant offered to prove upon the trial that the acceptance was given in payment and as security for ten barrels of whisky, which had been purchased by the defendant from the drawers of the draft.

This evidence was objected to upon the ground that, under section 2 of the prohibitory statute, there was a presumption that the draft was in the hands of a *bona fide* holder for value, and therefore the *onus* was upon the defendant to prove notice to the holder of the draft of the illegal consideration, before any evidence could be introduced to prove the illegal consideration.

The objection was sustained, and the court refused to allow testimony to be given as to the consideration, and ordered judgment for the plaintiff.

The Supreme Court reversed this ruling.

The prohibitory statute declared all contracts void made in violation of it, excepting therefrom notes and drafts in the hands of *bona fide* holders for value and without notice.

Judge Christiancy, in reversing the court below, said:—

"We do not propose to give a definite opinion upon the point whether the illegality being first shown, the burden of proof would have rested on the plaintiff to show actual want of notice; this might require actual proof of a negative. BUT WE ARE INCLINED TO THE OPINION THAT THEY SHOULD HAVE SHOWN THE NATURE OF THE TRANSACTION ACCOMPANYING THE TRANSFER, and if that disclosed no suspicion of such notice, it might make a *prima facie* case of want of notice and throw upon the defendant the burden of proving notice."

The opinion of Judge Christiancy in this case contains a full discussion of the law upon this subject, and is authority for the rule that illegality of consideration is in the same category with fraud and duress as destroying presumption and casting the burden of proof upon the holder.

The learned judge also remarks that: "in cases of illegality of consideration it is not to protect the equities of the defendant, but upon the *ground of public policy*, to uphold the law, and to discourage its violation or evasion, that this burden of proof

is cast upon the plaintiff. It is as much the duty of courts to discourage the violation or evasion of law as to protect the equities of the parties, and it is upon this principle that the naked defense of illegality is allowed."

A recent case is that of Bank *vs.* Diefendorf, Lawyer's Rep. Annotated, Book 10, page 679.

Van Valkenburgh procured from the defendant two promissory notes of $1000 each, payable to one Henderson or bearer. The bank, who was the plaintiff in the case, purchased the notes from Henderson at its banking-house before maturity. The cashier of the bank testified to all the circumstances surrounding the purchase of the notes, and at the close of the case the plaintiff requested the court to direct a verdict for plaintiff, which request was denied. The court submitted the case to the jury, under the instruction that if they found the notes were procured by fraud, and under such circumstances as would not entitle the payee to recover upon them, they should consider the further question whether the plaintiff purchased said notes for value and in good faith, and if it did not, defendant was entitled to a verdict.

To this instruction the plaintiff took an exception. The Court of Appeals, per C. J. Ruger, in affirming the case, said: "A sufficient number of authorities have been cited to show the uniformity with which the cases in the highest courts of the State hold that upon proof by the defendant that his obligations have been fraudulently or illegally obtained and put in circulation, the person seeking to recover upon them must show *not only that he bought before maturity* and paid value, but also the circumstances under which he acquired the paper, with the view of enabling the jury to determine whether he acted in good faith or not. It makes no difference in the question presented whether the plaintiff pursues the orderly course of first presenting and proving his note, relying upon the presumptions of *bona fides* which accompany the possession of the paper, and delays making proof of the circumstances as a part of his affirmative case. The burden of making out good faith is always upon the party asserting his title as a

bona fide holder in a case where the proof shows that the paper has been fraudulently, feloniously, or illegally obtained from its maker or owner. Such a party makes out his title by presumption until it is impeached by evidence showing the paper had a fraudulent inception, and when this is done the plaintiff can no longer rest upon presumptions, but must show affirmatively his good faith."

To the same effect is Kain *vs.* Bare, 31 North Eastern Reporter, 205, Appellate Court of Indiana. The suit was upon a promissory note. The plaintiff alleged that the payee of the note had indorsed the same to the plaintiff before maturity and for a valuable consideration. The defendant's answer averred that the note was given for an illegal consideration. A demurrer was filed to this answer, which demurrer was overruled by the court. An appeal was taken, and the action of the court in overruling the demurrer was laid as error. The Appellate Court sustained the action of the court below in overruling the demurrer, and said :—

" The appellant further insists that the answer fails to show knowledge on the part of the payee of the note, the present plaintiff and the plaintiff below. We think the answer abundantly shows such knowledge, *although the burden of alleging and proving a want thereof, and that the note was purchased in good faith, rests upon the appellant.* Tescher *vs.* Mera, 118 Indiana, 586; Giberson *vs.* Jolly, 120 Indiana, 301; Bank *vs.* Leonhart, 126 Indiana, 206. This rule obtains as the foregoing cases show, notwithstanding the note is governed by the law merchant."

II. The foregoing point is one relating to proper pleading, and involves the substance of what is necessary to be averred by the plaintiff to entitle him to judgment for want of a sufficient affidavit of defense, without being compelled to go before a jury, where the defense set up is want of legality in the origin of the notes sued on. But there is a still more important question involved in this case, which underlies the right of the plaintiff to recover under any form of pleading, which we will now proceed to discuss.

There can be no doubt whatever as to the illegal character of these notes in their origin. There is really "a great cloud of cases" which decide that wherever a contract has been made in contravention of the statute law of a Commonwealth, no action can be maintained to enforce that contract, or for the price of that contract.

The following is a full copy of the Act of 1874, upon which this branch of the defense in the case is rested:—

An Act

To prohibit foreign corporations from doing business in Pennsylvania without having known places of business and authorized agents.

(P. L., 1874. Page 108.)

Section 1. *Be it enacted, &c.*, That from and after the passage of this Act no foreign corporation shall do any business in this Commonwealth until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein.

Sec. 2. It shall not be lawful for any such corporation to do any business in this Commonwealth until it shall have filed in the office of the Secretary of the Commonwealth a statement under seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agents therein, and the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents in each and every of said offices.

Sec. 3. Any person or persons, agent, officer, or employé of any such foreign corporation who shall transact any business within this Commonwealth for any such foreign corporation, without the provisions of this Act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding $1000, or either, at the discretion of the court trying the same.

It will be observed that this statute does not in terms make null and void all contracts made in violation of its provisions. If it did contain such a provision, the question before the court would be much simplified.

The rule of law is well established, that whenever a statute declares all contracts void made in violation of its provisions, all notes, the consideration of which is illegal under the terms of the statute, are and must be void in the hands of every holder.

The first question which arises, therefore, is, what is the rule of law applicable to contracts made in violation of the provisions of a statute, prohibiting the transaction of all business whatever, without expressly declaring that such contracts made in pursuit of the prohibited business, shall be void?

The decisions of the Supreme Court of Pennsylvania have been uniform in establishing the principle of law that no contract made in contravention of the laws of the State can be enforced in Pennsylvania. There is a great cloud of cases in Pennsylvania which leaves the law in no doubt, "that wherever a contract has been made in contravention of the laws of the Commonwealth, no action can be maintained to enforce that contract or for the price of it."

The following cases fully support and establish the foregoing as the well-established law of Pennsylvania:—

Mitchell *vs.* Smith, 1 Binney, 110.

A bond was given for a Connecticut title to land, the sale of which was prohibited by Act of Assembly. The defendant held the land and was living upon it.

This principle was laid down:—

That a contract made in a manner prohibited by statute cannot be enforced in a court of this State, though not expressly declared to be void by the Act. Forbidding a thing and imposing a penalty is a prohibition, and neither party can sustain any suit on such contract.

Seidenbender *vs.* Charles *et al.*, 4 S & R., 150.

A promissory note was given by Seidenbender to Charles, decedent, to be paid on the delivery of a deed in fee simple

for such lot of land as shall be drawn against certificate 102, purchased by them, in Blue Rock, on Susquehanna River.

The defense was that the bond was given upon an illegal consideration.

Held, by TILGHMAN, C. J.:—

"I consider it as perfectly settled that the action cannot be sustained, founded on a transaction prohibited by statute, although it be not expressly declared that the contract is void."

Eberman *vs.* Reitzal, 1 W. & S., 181.

The defendant was a lottery broker in Lancaster.

The plaintiff claimed that defendant had contracted to sell him one-fourth of a ticket in the New York Lottery. The ticket was not delivered. The defendant drew a prize, amounting to $5312.20, with the ticket.

Suit was commenced to recover one-fourth of the sum.

The defense was that the sale of foreign lottery tickets was prohibited by statute, and that this was a bar to the suit.

Held:—

That "wherever the transaction upon which the claim is founded must necessarily be proved to make out the plaintiff's case, and that transaction is *malum in se*, and prohibited by legislative enactment, there can be no recovery. The rule must be general, and not frittered away nor lost sight of by changing the form of action or giving plausible names to forbidden acts."

Columbia Bank *vs.* Haldeman, 7 W. & S., 233.

A bond was given to a stakeholder to indemnify him for giving up to the winner money deposited as a bet upon an election. The plaintiff handed the money over after he had been notified not to do so, and suit was commenced against them for the money so paid, and a recovery was had. Then this suit was brought on the indemnity bond.

The defense was that the bond was void, having been given in contravention of the Act March 24th, 1817.

HUSTON, J., *held*:—

"As long ago as the time of Lord Hale it was decided that every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be void, and only inflicts a penalty on the offender, and this has been fully recognized in the case of Smith *vs.* Mitchell, 1 Binney, 110.

Hutchinson *vs.* Boggs, 28 Pa. St. Rep., 294.

In a suit by an indorser *vs.* maker of a note, the presumption is that plaintiff obtained it for a valuable consideration in the usual course of business before it was due; but when the maker, in an affidavit of defense, shows that the note was obtained by fraud, "he is then entitled to call upon the plaintiff to show that he is a holder of the note by purchase for value, before maturity, without notice of the fraud."

Morris Coal Co. *vs.* Barclay Coal Co., 68 Pa. St. Rep., 173–88.

Plaintiff and defendant were corporations chartered in this State.

A draft in favor of the plaintiff was drawn upon the defendant and duly accepted. Payment was refused, and this suit was upon the draft.

The sales of coal mined by both parties was sold in New York. The plaintiff and defendant, together with three other coal companies, made a contract, providing that the market for coal from the regions controlled by the parties to the contract be divided.

The business was to be under a committee with power to appoint a general sales-agent.

Each party was to deliver coal to such party as their agent should select. A general average of all sales was to be made and adjusted every month, each to receive same average price.

The committee was to adjust prices for coal and freight rates.

Each party could only sell their proportion of coal.

The committee, in making its adjustment under this contract, found that there was due the Morris Run Company, from the Barclay Company, $2466, for which the draft in suit was drawn upon the Barclay Company.

There was no dispute as to the correctness of this settlement.

The general sales-agent was in New York, the point of average was in that State, and the sales were more extensive in New York than elsewhere.

The statute of New York provided that if two or more persons conspire, first, to commit an offense, or, second, to commit any act injurious to the public health, to public morals, or to trade or commerce, they shall be deemed guilty of a misdemeanor.

Held, by AGNEW, C. J.:—

1. That the contract of these companies to control the supply and price of the Blossburgh and Barclay coal regions was illegal, and the contract void.

2. That when a bill, note, or bond is but an instrument to execute an illegal contract, it is tainted by the illegality and cannot be recovered on.

The illegal consideration enters directly into the instrument and is followed up because the law will not permit itself to be violated by mere indirection. In Lestapies *vs.* Ingraham, 5 Barr, 71, C. J. Gibson says, the solemnity of the security would not preclude an inquiry into the consideration of it had it been illegal, and in Swan *vs.* Scott, 11 S. & R., 155, Duncan, J., says, of a bond, the consideration of which grew out of an illegal transaction, there the illegal consideration is the sole basis of the bond, and there can be no recovery. In the present case the bill itself refers directly to the equalization account, and was given in immediate execution of the contract.

The judgment of the court below, deciding that no recovery could be had upon the draft, was affirmed.

Burkholder *vs.* Beetem, 65 Penna. St. Rep., page 496.

Judge Sharswood said, speaking of the Act of 1850, which imposes a penalty on a cashier engaging in the purchase and

sale of stocks: "The bill is a public general statute, of which we are bound to take notice. When an Act or contract is prohibited under penalty it is unlawful and void, though the statute does not expressly so decree."

Ham *vs.* Smith, 87 Pa. St. Rep., page 63.

Smith was nominated for the legislature. It was proposed to Smith that he withdraw as a candidate.

He consented, provided he was reimbursed for his expenses.

Ham and two others gave Smith their judgment note for $500, payable in thirty days, in consideration of his withdrawal.

The note was not paid at maturity, and judgment was entered upon it and execution issued.

The judgment was opened and jury trial had, upon which the trial judge held that the entry of judgment constituted an executed contract, and the court will not unravel the transaction to hunt out an illegal consideration, and ordered a verdict for plaintiff.

This judgment was reversed, Gordon, J., saying:—

"To cite authority to prove that courts should not lend their aid to enforce contracts, such as this, would be spending time to no purpose, since no one doubts it. But it is said the contract has been executed, and therefore the courts will not interfere. The law undoubtedly is well stated if the facts were so. But the contract has not been executed, and the court is never required to lend its aid for the purpose of its execution. Judgment is asked upon the note, and the proofs show the note to be part of an illegal and void contract; how, then, can the court enforce it? As was said by Mr. Justice Agnew, in answer to an argument similar to the above in the case of Morris Coal Co. *vs.* Barclay Coal Co., 18 Smith, page 173: 'When a bill, note, or bond is but an instrument to execute an illegal contract, it is tainted by the illegality and cannot be recovered. The illegal consideration enters directly into the instrument, and is followed up because the law will not permit itself to be violated by mere indirection.' Were the doctrine otherwise, every illegal contract, however much op-

posed it might be to public morality, or even to common decency, might be readily and securely covered from judicial inquiry by the mere interposition of a note or bond. Were it only a question between the parties we might leave them to the consequences of their own contract, but it is not so; it extends further and involves the public welfare, and we certainly know that the best way to suppress any public vice is to make it unprofitable."

Holt *vs.* Green, 73 Penna. St. Rep., page 198.

The plaintiff brought this suit to recover commissions for the sale of machinery sold by him for the defendant. The plaintiff had not taken out a United States license as a broker according to the provisions of Act of Congress, June 30th, 1874. Upon these facts appearing, the court entered a nonsuit, which was affirmed, Mercur, J., saying: "We are aware that there are some English authorities, as well as decisions in our sister States, that make a distinction in cases of contracts predicated of a violation of the revenue laws, and especially that class of them which does not expressly declare the contract to be void. The case of Aiken *vs.* Blaisdell, 41 Vermont, 655, is a strong case going to sustain a contract of sale contrary to law. We prefer, however, to stand by our own decisions. The unbroken current of authorities in this State is to hold a contract void which is grounded upon a clear violation of a statute, although it may not be expressly so declared in terms."

Thorne *vs.* Travelers' Ins. Co., 80 Pa. St. Rep., page 15.

Thorne was appointed agent of a foreign insurance company. He gave a bond to the company, with sureties, conditioned for paying over moneys received by him.

This suit was by the company against Thorne and his sureties for not paying over.

Held, that the company could not recover. The insurance company not having complied with the Act of 1868.

MERCUR, J.:—

"It has often been held that an action founded on a transaction prohibited by statute cannot be maintained although a

penalty be imposed for violating the law, and it be not expressly declared that the contract be void. Mitchell *vs.* Smith, 1 Binney, 110; Seidenbender *vs.* Charles, Ad., 4 S. & R., 151; Swan *vs.* Scott, 11 S. & R., 155; Columbia Bank *vs.* Haldeman, 7 W. & S., 233; Thomas *vs.* Brady, 10 Barr, 164; Scott *vs.* Duffy, 2 Harris, 18; Holt *vs.* Green, 23 Smith 198. In this last case it was said the objection may often sound very ill in the mouth of a defendant, but it is not for his sake the objection is allowed. It is founded upon general principles of policy, which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is that no court shall lend its aid to a party who grounds his actions upon immoral or illegal acts."

Johnson *vs.* Hulings, 103 Pa. St. Rep., 498.

A., whose business was the buying and selling of real estate for others upon commission, negotiated a sale of real estate for B., for which A. was, by a special agreement, to receive $10,000. A. had no license as a broker. *Held*, that A. was not entitled to recover.

GREEN, J.:—

The test whether a demand connected with an illegal transaction can be enforced at law is, whether the plaintiff requires the aid of the illegal transaction to establish his case.

List *vs.* The Comn., 118 Pa. St. Rep., 322.

Corporations are creatures of local law and have not even an absolute right of recognition in other States, but depend for that and for the enforcement of their contracts upon the consent of those States, which may be given accordingly on such terms as they please.

Lasher *vs.* Stimson, 145 Pa. St. Rep., 30.

The plaintiff did work and furnished goods to and on the credit of a foreign manufacturing company upon the order of the defendant, who assumed to represent it as its agent in this State. The corporation had not complied with the Act of 1874. The plaintiff did not know it was a foreign corporation.

The company could not authorize defendant to do business for it in this State. The defendant was personally liable.

McCOLLUM, J. :—

"The Act of 1874 prescribes the terms on which a foreign corporation may engage in business in Pennsylvania. Compliance with these is a condition precedent to its recognition and legal existence therein. It cannot, by virtue of its charter, exercise its functions beyond the territorial limits of the sovereignty which created it. It cannot transact business in other States or sovereignties without their consent, express or implied. * * * The right of a State to dictate the terms on which a foreign corporation shall be permitted to transact business within its jurisdiction cannot be doubted if the conditions imposed are not repugnant to the Constitution of the United States. * * *

"The terms of the Act of 1874 are not onerous or in conflict with any constitutional provision or rule of public policy; but they are clearly prohibitory, and they indelibly stamp as unlawful any business transaction within this State by a foreign corporation which has not complied with them. It is only by its observance of them that it can have a legal existence for business purposes within their jurisdiction or acquire contractual rights which our courts will recognize."

The latest case upon this subject in Pennsylvania is a decision by Judge Thayer, President-Judge of Common Pleas, No. 4, Philadelphia County.

The case which elicited this opinion was the case of the Thorne Type-Setting Machine Company (the same payee as in the notes in this suit) *vs.* the *Record* of this city, and was a suit against that newspaper for the recovery of the price of some of these very same machines sold by that company in this State in violation of the statute of 1874.

A nonsuit was entered against the Thorne Type-Setting Machine Company in the following opinion delivered by Judge Thayer :—

"I do not see how it is possible to ignore this statute, which is not only very explicit, but mandatory. The Act of 1874

says that: 'It shall not be lawful for any such corporation' (that is, a foreign corporation) 'to do any business in this Commonwealth until it shall have filed in the office of the Secretary of the Commonwealth a statement under the seal of said corporation and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein; and the certificate of the Secretary of the Commonwealth under the seal of the Commonwealth of the filing of such statement, shall be preserved for public inspection by each of said agents in each and every of said offices. And any person or persons, agent, officer, or employé of any such foreign corporation who shall transact any business within this Commonwealth for any such foreign corporation without the provisions of this Act being complied with, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding $1000, or either, at the discretion of the court trying the same.'

"This law therefore makes it a crime for any foreign corporation to carry on business in the State of Pennsylvania without complying with the requisites of the Act. Ever since the decision of the case of Mitchell *vs.* Smith, in 1 Binney, the decisions in this State, so far as I am aware, have been uniform, that no contract which is made in contravention of the laws of the State can be enforced in Pennsylvania. A familiar illustration of it is a suit, for example, for the price of a lottery ticket—lottery tickets, like the carrying on of a business by a foreign corporation, being a business prohibited in the State of Pennsylvania. It has been held no action can be maintained upon such a contract. That point has been ruled in a large number of cases. The very point was ruled in Eberman *vs.* Reitzel, 1 W. & S., and in Rhodes *vs.* Sparks, 6 Pa., and in Columbia Bank & Bridge Co. *vs.* Haldeman, 7 Watts & Ser., and in Morris Run Coal Co. *vs.* Barclay Coal Co., 68 Pa., and more recently in the case of Thorne *et al. vs.* Travelers' Insurance Co., 80 Pa., and again in Lasher *vs.* Stevenson, 145 Pa., 30.

"So that here is really a great cloud of cases decided by the Supreme Court upon this point, which leave the law in no doubt whatever, that wherever a contract has been made in contravention of the laws of the Commonwealth no action can be maintained to enforce that contract or for the price of that contract.

"In the present case there seems to be no contradiction of the evidence that this contract was made here in Philadelphia, and that the plaintiffs have not complied with the provisions of the Act of 1874, and it falls therefore directly within the principle ruled by all these cases, and it is impossible to decide it in any way but one. The case falls plainly within the numerous cases which I have cited, there being no doubt about the fact that the contract was made here. The president of the plaintiff company has sworn that it was made here with Mr. Norris, and has fixed about the time and the place when and where it was made. There being no doubt about the facts of the case, the evidence being clear and the facts bringing the case directly within the operation of the principle to which I have referred, the motion of the defendant for a nonsuit must be allowed. No other result can be reached that I can see."

We therefore contend that so far as this State is concerned it makes no difference whether or not the statute follows the prohibition from doing business with a provision that all contracts which may be made in violation of it shall be void, and that the well-established rule is that no contract whatever, made in contravention of the laws of the State, can be enforced in any of the courts of the State, and that the notes upon which this suit is brought, having been given in Pennsylvania for an illegal consideration, are void in the hands of any person.

We have endeavored to show that the Supreme Court of Pennsylvania have by many decisions firmly established the following principles of law, that any contract made in a matter prohibited by statute cannot be enforced in a court of this State, though not expressly declared to be void by the Act. Mitchell *vs.* Smith, 1 Binney, page 110; Seidenbender *vs.* Charles, 4 S. & R., 151; Eberman *vs.* Reitzal, 1 W. & S.,

181; Columbian Bank *vs.* Haldeman, 7 W. & S., 233; that when a bill, note, or bond is but the instrument to execute an illegal contract it is tainted by the illegality and cannot be recovered upon. That the illegal consideration enters directly into the instrument and is followed up, because the law will not permit itself to be violated by mere indirection. Morris Coal Co. *vs.* The Barclay Coal Co., 68 Pa. St. Rep., pages 173–88. That corporations are creatures of local law, and depend for the enforcement of their contracts upon the consent of the States, which may be given upon such terms as they please, so long as they are not repugnant to the Constitution; that the terms of the Act of 1874 are not onerous or in conflict with any constitutional provision or rule of public policy; that any business transaction within Pennsylvania by *a foreign* corporation, without having first complied with the provision of the Act of 1874, are indelibly stamped as unlawful. List *vs.* The Comm., 118 Pa. St. Rep., page 322; Lasher *vs.* Stevenson, 145 Pa. St. Rep., page 30.

In addition to the foregoing cases we desire to cite a few cases decided by the Supreme Court of the United States as establishing the same general rule. In Craig *vs.* The State of Missouri, 4 Peters, 408, the question was as to the right of the indorser of a note to set up as a defense against it, first, the validity of the consideration of the note, and, second, the constitutionality of the law under which the note originated.

C. J. Marshall said: "Neither can it be doubted that the plea of *non-assumpsit* allowed the defendant to draw into question at the trial the validity of the consideration on which the note was given. Everything which disaffirmed the contract, everything which shows it to be void may be given in evidence on the general issue in an action of *assumpsit;* the defendants therefore were at liberty to question the validity of the consideration which was the foundation of the contract and the constitutionality of the law in which it originated. * * * It has never been doubted that a note given upon a consideration which is prohibited by law is void. Had the

issuance or circulation of certificates of this or any other description been prohibited by a statute of Missouri, could a suit have been sustained in the courts of that State on a note given in consideration of the prohibited certificates; if it could not, is the prohibition of the Constitution to be held less sacred than those of a State law?

In the case of Armstrong *vs.* Toler, 11 Wheaton, page 258—C. J. Marshall held that where a contract grows immediately out of and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. So if the contract be only in part connected with the illegal consideration, and growing immediately out of it, it is equally tainted by it. No principle is better established than that no action can be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law.

In Ducat *vs.* Chicago, 10 Wallace, page 410, it was held that the power of the State to discriminate between her own domestic corporations and those of another State desirous of transacting business within her jurisdiction is clearly established in the case of Paul *vs.* Virginia, 8 Wallace, 168, as it also has been in the earlier case of Augusta *vs.* Earle, 13 Peters, page 517.

Therefore it has been decided, both in Pennsylyania and the United States Supreme Court, that in suits upon contracts, bonds, notes, and drafts no action can be maintained upon a contract the consideration of which is either wicked in itself or is PROHIBITED BY LAW. In none of the cases above cited is there any exception, either laid down or recognized, that this rule only applies to the original parties to the transaction, and not to the holder of a promissory note or draft, who may be the holder for value and without notice.

From whence, then, does such a doctrine derive its authority?

Upon an examination of the cases referred to by the textbook writers it appears that the case of Wyatt *vs.* Bulmer, 2 Espinasse's Reports, page 538, is the authority for the doctrine, and upon which all the subsequent cases rest.

That was a case, decided by a single judge during a jury trial, upon a promissory note drawn as long ago as 1793.

The decision was that the holder or indorsee of a note was not required to prove the consideration he gave for the note until the defendant proved not only an illegal consideration, but also that the holder was implicated in the illegal transaction. Such was the decision in Wyatt *vs.* Bulmer, and it is stated in a very few lines, and from the report of the case it does not appear to have been argued. No authority whatever is given to sustain the decision, nor is there any reasoning contained in the report to show upon what foundation the opinion rested.

Will any contend that the decision in Wyatt *vs.* Bulmer is good law to-day? If it is, what are we to do with the hundreds of cases which have decided that where the maker of a note proves by competent proof that it was obtained by fraud or duress, or that it was lost or stolen, the holder is required to prove that he is a *bona fide* holder for value.

Wyatt *vs.* Bulmer not only decides that you must show notice to the indorsee, but it goes much further, and decides that the indorsee must be implicated in the taint upon the note.

If, then, this ill-considered case is the source, foundation, and authority for the doctrine that no illegality in the consideration of a note, or fraud, or duress practiced in its procurement can avail as a defense, until the defendant shall be able to prove notice to the holder, why should it prevail now and be applied, simply because if the law were otherwise the business of discounting commercial paper would involve a hazard against which it would be impracticable for banks to guard? Is such a reason more potent and overwhelming than the preservation of a wise public policy? Because the rule we are contending for, as was said by Judge Mercur, in the case of Thorne *vs.* the Ins. Co., 80 Pa. St. Rep., page 15, "is founded upon general principles of policy, and no court should lend its aid to a party who grounds his action upon an illegal act."

An examination of the cases quoted by the learned judge

of the Circuit Court in his opinion (see Transcript of Record, page 8) as authority for the judgment in this case will show that they do not sustain the judgment nor controvert the rule which we ask to be applied.

The following language upon this subject is used at star page 145, seventh Sharswood edition of Byles on Bills: "Many cases there are also in which, though the transaction is prohibited by the legislature, the security is not expressly avoided. In such instances the bill is void in the hands of the parties to the illegal transaction, or cognizant thereof, but not in the hands of a *bona fide* indorsee for value before the bill is due without notice of the illegality." The case of Wyatt *vs.* Bulmer is the only authority quoted for the position, even accepting this statement of the law as being the correct rule. Still, it is no authority for the doctrine that after the drawer of a note has shown that the consideration was illegal, such as will be sufficient to shift the burden of proof upon the indorsee, there arises a presumption that the holder had no notice of the illegality of the consideration.

We have already seen that the next succeeding section to the one quoted in the learned judge's opinion from Daniel on Negotiable Instruments states that when the illegal consideration appears the burden of proof shifts upon the holder to show that he is a *bona fide* holder for value WITHOUT NOTICE.

The case of Williams *vs.* Cheney, 3 Gray, page 223, was a suit upon a promissory note given by the defendant in payment of certain premiums of insurance which he had obtained upon his life.

There were many defenses. Among others was the defense that the consideration was illegal in that the company which issued the policy, and to whom the notes were given, was doing business in violation of the law of the State.

It was a trial before a jury, and the learned judge charged the jury upon this branch of the defense that the plaintiff was presumed to know what the law of Massachusetts upon this subject was, and left it to them to find from the evidence whether the plaintiff had notice that the laws had not been

complied with, or had reason to know that what the laws of Massachusetts required had not been done.

The jury failed to agree, and the learned trial judge entered judgment himself against the plaintiff.

The Supreme Court reversed the action of the judge, and said that his charge to the jury laid down the correct rule.

This case is a ruling directly against the ruling of the learned judge in this case, and decides squarely the position we are contending for, namely, that where it has been shown that the consideration of the note was a transaction in violation of a statute, the holder of a note is presumed to know the law of Pennsylvania, and that it is for the jury to find from all the facts and circumstances surrounding the holder's coming into possession of the note, whether or not he had notice that the laws of Pennsylvania had not been complied with by the payee of the notes, or had reason to know that what the laws of Pennsylvania required had not been complied with.

The case of Carpenter *vs.* Longan, 16 Wallace, page 271, was a bill in equity for the foreclosure of a mortgage, given by one Mohone Longan and Jesse B. Longan. A note was given by the same parties at the same time, and the mortgage, which was the subject of the bill in equity, was security for the note.

The mortgage and note were assigned before maturity to the plaintiff. The answer averred that when the note was executed wheat and flour were delivered to the payee and mortgagee, which he promised to sell and apply the proceeds to the payment of the note; that he afterwards sold the wheat and flour, and failed to apply the proceeds as he had agreed.

The decision of court turned upon the failure of the proof to establish that the fact that the indorsee had knowledge of the transaction between the original parties. The learned judge, in delivering the opinion, upon page 273, says: "Notice of anything touching the wheat and flour is not brought home to him," while immediately preceding that remark he says that it was proved and not controverted that

the note and mortgage were assigned to appellant for a valuable consideration and before maturity.

There is only one sentence in the opinion that would even seem to uphold the rule laïd down by the learned judge in this case, which is as follows: "The assignment of a note under due raises the presumption of the want of notice, and this presumption stands until it is overcome by sufficient proof."

There was no question before the court in that case anything like the case at bar, for two reasons; first, the case had been heard upon false proofs by both parties, and, second, there was an absolute finding of the judge who delivered the opinion, "that there was nothing in the case touching the wheat and flour brought home to the indorsee."

What was there said must be taken in view of the facts which were before the court.

HAMPTON L. CARSON,
JAMES H. SHAKESPEARE,
For Petitioners.

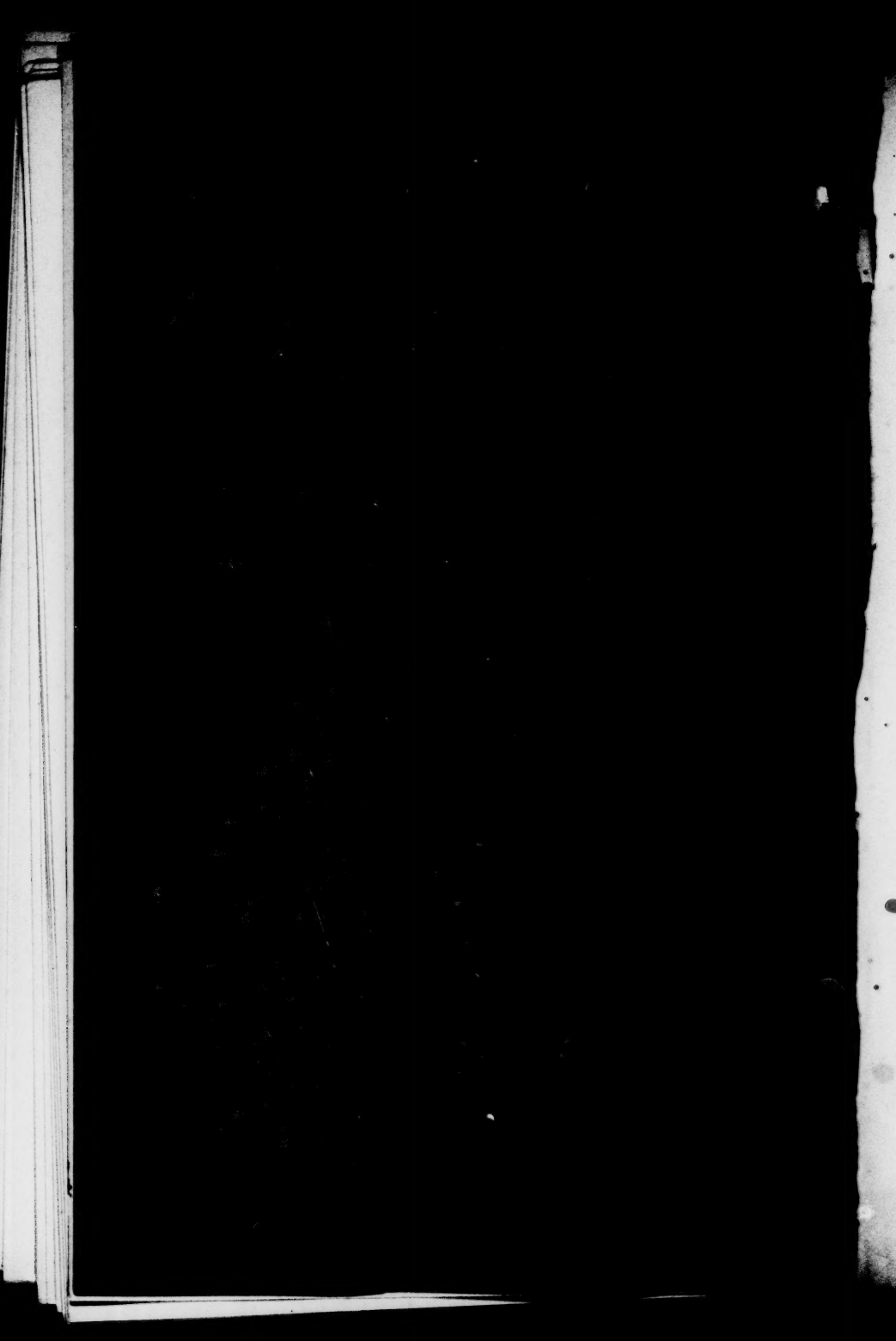
IN THE

Supreme Court of the United S

In the matter of the petition of the T
Limited, for a writ of
appeals for the Third
Field Company Limited v. City Bank of

BRIEF OF ARGUMENT AGAINST THE APPLICATION.

JOHN HAMPTON BARNES,
GEO. TUCKER BISPHAM,
For City Bank of



In Supreme Court of United States.

October Term, 1893. No.

In the matter of the Petition of the Press Company Limited for a writ of certiorari *to the Circuit Court of Appeals for the Third District in the case of the Press Company Limited* vs. *City Bank of Hartford.*

Brief of Argument in behalf of the City Bank of Hartford against the Application for the Writ.

The record shows that the jurisdiction of the Circuit Court of the United States depends upon the opposite parties to the suit being citizens of different States.

Cases of this nature are expressly included in the Act of March, 1891, creating the Circuit Court of Appeals among those in which the decree of that court shall be final, unless such case shall be certified to this court for decision by the Circuit Court of Appeals of its motion, or by order of this court.

The Circuit Court of Appeals has not thus certified this case, and it should, it is submitted, be shown to this court that the case involves some question of paramount importance to move the court to allow the writ. The question involved, however, is but one of *local Practice* under the Acts of Assembly of the State of Pennsylvania and under the settled construction thereof by the State courts; and the argument in support of the petition when analyzed will be found to be based upon the alleged error of the Circuit Court in entering judgment for the plaintiff upon the pleadings, instead of sending the case to a jury.

The Act of Assembly of Pennsylvania approved the 25th of May, 1887, by which the practice in this action is governed, provides that the plaintiff's Statement of Claim shall contain a concise statement of his cause of action, and in the action of *assumpsit* shall be replied to by affidavit.

The writ in this case was a summons in *assumpsit.*

The Supreme Court of Pennsylvania said in the case of Barr *vs.* McGary, 131 Penna. State Report, pages 401–406 (1889) :—

"The Act (May 25th, 1887) provides that the plaintiff shall file a concise statement of his cause of action, together with a copy of the instrument on which the action is founded, and serve the same on the defendant. The defense must then be stated and verified by the oath of the defendant. This makes up the issue on which the case is to go to trial, and if the defense set out is insufficient in law to prevent a recovery, the plaintiff may ask judgment for want of a sufficient affidavit of defense."

And the same court, in Ashman *vs.* Weigley, 148 Penna. State Report, pages 61, 63 (1892), referring to the same Act, said :—

"The Procedure Act of 1887 made a material change in the affidavit of defense law. By its express terms the plaintiff's statement, which takes the place of a common-law declaration, must, in the action of *assumpsit*, be replied to by affidavit. Hence, *whatever averments therein contained are not denied must, upon a rule for judgment in default of a sufficient affidavit of defense, be taken as admitted.*"

In the case before the court the plaintiff's Statement of Claim avers :—

1. That the plaintiff purchased the notes for value before maturity.

2. That demand was made by the plaintiff upon the defendant for the payment of the notes at maturity.

3. That the plaintiff is indebted to the defendant in the amount of the notes, with interest.

The Affidavit of Defense set out that the notes were given by the plaintiff to the payee, a foreign corporation as to the State of Pennsylvania, in consideration of the delivery to it

of certain articles under a contract made in Pennsylvania between the maker and the payee; and that the payee had not complied with the provisions of an Act of Assembly of the State of Pennsylvania requiring foreign corporations to register in the office of the Secretary of the Commonwealth before such corporations can legally do business therein.

This is the *sole defense.*

The Affidavit did not *deny*—

1. The making of the notes.

2. That the plaintiff is a *bona fide* holder for value before maturity.

Nor did it aver that the plaintiff had notice of the illegal consideration set out in the affidavit of defense.

Upon this affidavit the court, upon a rule, entered judgment for want of a sufficient Affidavit of Defense, as required by the practice above stated.

It is submitted the Court of Appeals did not err in affirming this judgment.

There was nothing which the plaintiff was required to prove to entitle it to recover. Its *prima facie* case was not attacked. The plaintiff is not required, in the first instance, to prove a negative, namely, that it did not have notice of an illegality in consideration. The assignment of the notes before maturity raises the presumption of want of notice of an illegality. As soon as the plaintiff proves that he bought for value before maturity, the presumption of good faith arises and continues until affirmative evidence of notice is given.

Carpenter *vs.* Longan, 16 Wallace, 273.

The case of Lerch Hardware Co. Limited *vs.* Bank, 109 Pa., 240, cited by the petitioner and holding a contrary doctrine, was decided in 1885, and the practice established by it was changed by the provision of the Act of 1887, and by the later decisions of the same court cited above, as also by the cases of Erie Shoe Co. *vs.* Eichenlaub, 127 Penna. State Report, 164 (1889); Newbold *vs.* Pennock, 154 Penna. State Report, 591 (1893).

The case of Smith *vs.* Sac County, 11 Wallace, page 139,